Filed 12/23/08 In re C.A. CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| In re C.A., a Person Coming Under the Juvenile Court Law. | B207959<br>x-ref. B199911 |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>L.A.,<br><br>Defendant and Appellant. | (L.A. Super. Ct. No. CK 61836) |

APPEAL from an order of the Superior Court of Los Angeles County. Sherri Sobel, Juvenile Court Referee. Affirmed.

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Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel and William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

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L.A., mother of three-year-old C.A., appeals from the juvenile court's order terminating her parental rights. She argues that the order should be reversed because the parental relationship exception under Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i), applies.[1] We affirm.

BACKGROUND

L.A. (hereafter mother) is the biological mother of C.A., who was detained along with two half-siblings, N.S. and T.S., in November 2005. In a previous appeal, we affirmed the juvenile court's termination of mother's parental rights as to N.S. and T.S.

N.S. (15 years old when we filed our previous opinion) and T.S. (then 12), are the children of mother and J.S. Their younger half-brother, C.A. (now 3), is the child of mother and E.A. (father), who was mother's husband as of 2003. N.S., T.S., J.S., and father are not parties to this appeal.

All three children were removed from mother's and father's custody by the San Diego County Children's Services Agency in November 2005. According to the detention report, the children had been subjected to a three-hour violent altercation between mother and father during which both adults were physically abusive toward each other and the children. T.S. (then only 10 years old) was trying to escape through a small bathroom window more than 15 feet off the ground. Mother threw something at father while he was holding C.A., hit father across the back with a metal towel holder, and hit him with a mirror, causing him "to bleed from all over his face." Both adults suffered head trauma so severe that they had to be "life flighted" to the hospital. The investigators described the incident as a crime scene, and one officer said, "The last time I saw this much blood was on a dead body."

Once in protective custody, N.S. and T.S. described the domestic violence and abuse they had witnessed and suffered throughout their lives, first while mother was living with J.S. (their biological father) and then during mother's relationship with father, including mother's threats to kill N.S. and her statements that she had bought a

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[1] All subsequent statutory references are to the Welfare and Institutions Code.

gun for that purpose. The San Diego County Children's Services Agency filed dependency petitions on behalf of all three children (§ 300), alleging that violence in the family home placed the children at substantial risk of serious physical harm.

On December 8, 2005, mother entered a no contest plea (in the San Diego Superior Court) to the allegations in the petitions, and the petitions were sustained. The court, which had previously not authorized any visitation between mother and C.A., gave the social worker discretion to allow supervised visits with the "concurrence" of C.A.'s counsel.

At the February 2, 2006, disposition hearing, the court declared C.A. a dependent child of the court, removed him from his parents' custody, and ordered him placed in the approved home of a relative. The court ordered supervised visitation between mother and C.A., the location and supervisor of the visitation to be selected by the social worker.

In a report dated March 13, 2006, mother's psychological evaluator diagnosed her with posttraumatic stress disorder, bipolar disorder, major depressive disorder with postpartum onset, and narcissistic personality disorder.

At a special hearing on March 13, 2006, the San Diego court transferred the matter to Los Angeles County because mother had moved here. On April 11, 2006, our dependency court accepted the transfer, appointed counsel for mother, and adopted the San Diego court's orders.

The court conducted the six-month review hearing on May 8, 2006. The six-month review report of the Department of Children and Family Services (DCFS) stated that C.A. was placed with his maternal great aunt and that mother was coming regularly for her two-hour monitored visits. According to the report, the aunt said that C.A. was doing well in his current placement. The report also stated that mother was "reportedly" attending domestic violence and parenting classes at a DCFS-approved facility but that DCFS had not yet obtained confirmation from the facility. Mother was also attending individual counseling with a DCFS-approved counselor, but DCFS had not yet received a progress report. The report stated that according to the previous social worker, mother

was in compliance with the case plan. On the basis of the recommendations of the previous social worker, DCFS recommended an additional six months of reunification services for mother with C.A.

At the hearing on May 8, 2006, the court found that mother had consistently and regularly contacted and visited with C.A. The court ordered six additional months of reunification services and authorized DCFS to increase the frequency and duration of visits, but DCFS was not to allow unmonitored visits without court approval. The court set the 12-month review hearing for November 6, 2006.

On August 30, 2006, the court sustained a section 387 petition filed by DCFS seeking a new placement for C.A. on the ground that the maternal great aunt was not willing to provide ongoing care and supervision for C.A. because mother had been "disrespectful" toward her and she consequently "did not want any further troubles between mother and herself." The trial court sustained the petition, removed C.A. from the aunt, and ordered him placed in a foster home.

The court conducted the 12-month review hearing on November 6, 2006. DCFS's 12-month review report stated that C.A. was doing well in his current foster care placement and that mother regularly came for her two-hour visits, at which she played age appropriate games with him. C.A.'s concurrent plan was adoption, but no prospective adoptive parents had yet been identified. Mother was enrolled in parenting classes and had attended 51 of 52 sessions, was enrolled in domestic violence classes and had attended 45 of 52 sessions, and was also attending individual counseling.

At the November 6 hearing, the court found that mother was in partial compliance with the case plan and ordered six additional months of reunification services with respect to C.A. only. The court calendared a permanency review hearing under section 366.22 for May 7, 2007. The court also acknowledged receiving a letter from J.S. (i.e., the father of C.A.'s siblings, N.S. and T.S.), who had not previously appeared in the case. In the letter, J.S. stated that he "fears for his life" and that he "wants his children back, but his fear of being murdered by mother has stopped him."

At the permanency review hearing on May 7, 2007, the court granted mother's request that her guardian ad litem and court-appointed counsel be relieved, and the court set a contested permanency review hearing for June 21, 2007.[2] In the course of the discussion of court-appointed counsel, mother insisted, "I do not wish to represent myself. I am myself." She also demanded a jury trial and demanded to see the contract that court-appointed counsel were "working under" so that she could prove it was a "fraudulent document." When informed that the contract was with the court, not with her, she again demanded to see it. After the court relieved both counsel and the guardian, the court asked mother whether she understood "why we're here[.]" Mother responded, "I don't want to talk until I get counsel and get some guidance. Maybe in the future." When the court asked if mother was going to hire a lawyer, mother said "I'm going to think about it" and "I'm going to consider it."

DCFS's report for the May 7, 2007, hearing described the course of DCFS's contact with mother and all three of her children since the previous report. In a December 2006 meeting between the social worker and the older children, N.S. and T.S., the children had disclosed "some very concerning history of child abuse by [mother] against them," describing her as "unstable, violent and dangerous" and "a liar, aggressive and an unpredictable person." When the social worker met with mother on January 22, 2007, mother admitted some of the conduct, including "the use of belts and the use of her hands to hit as a form of discipline." The social worker informed mother that DCFS was "being very cautious" about whether to reunify her with C.A., given

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[2] At a hearing in early March, mother had complained about her court-appointed lawyer. As described in our opinion in the previous appeal, during the ensuing Marsden hearing mother became "so agitated as to be unable to come back into court. She fired her lawyer and left." At the next hearing later that same month, mother refused to accept any court-appointed lawyer and became so disruptive that the court had her escorted out of the courtroom. In her absence, the court questioned her ability to advance her own position, noting that among other things she had talked about "admiralty court" and other irrelevant matters. The court then appointed a guardian ad litem to appear for mother and appointed counsel to represent mother through her guardian. At the next hearing, in April, mother refused to speak to the guardian and "fired" the new lawyer, then left the courthouse.

mother's "diagnosis of a personality disorder and a history of admitted physical and aggressive abuse towards her older children." Mother told the social worker that her diagnosis had been changed to bipolar disorder, that her therapist had stopped her services and sent a letter to that effect to DCFS, and that she was not taking medication. The social worker later learned that mother's former therapist had referred mother to another provider for additional counseling in November 2006 but mother had not followed up until mid-February, thereby missing more than two months of counseling. The social worker also noted that C.A.'s foster parents "have no trust in mother and find her to be very unpredictable in her behavior."

At a further meeting on March 21, 2007, the social worker informed mother that DCFS would be recommending termination of her family reunification services with respect to C.A., and that the decision "came after fully reviewing her history of physical violence on her children and ex-husband" as well as "her history of past [domestic violence] relationships." The social worker also noted mother's statement that she had been diagnosed with bipolar disorder but was not receiving counseling or medication. Mother became upset and said that she had never told the social worker she had been diagnosed as bipolar, and that rather it was the social worker who had diagnosed her as bipolar. Mother then said she wanted to have all future conversations with the social worker tape recorded, but the social worker told her that DCFS policy did not permit it.

That same day, mother arrived unannounced at the social worker's office and demanded to see either the social worker or her supervisor. When told that neither was available, mother tried dialing several different extensions within the office to try to talk to anyone about her case. Eventually mother left a voicemail with the social worker's supervisor requesting permission to tape record all conversations with the social worker. The next day the supervisor sent mother a letter denying the request and explaining that it was against DCFS policy to tape record conversations between clients and staff.

On March 23, 2007, mother telephoned the supervisor's supervisor and again asked for permission to tape record conversations with the social worker. Mother initially stated that she "had a third party with her listening" to the conversation, but

when pressed to identify the third party she recanted. Mother next said she was recording this very conversation, but, when told she did not have permission to do so, she said that she was just "writing things down." Mother then said she was calling to request permission to tape record her conversations with DCFS. When the supervisor's supervisor said "Okay" (apparently meaning "I understand, please continue"), mother quickly said "Okay, thank you so much for your permission to tape record my conversations with [DCFS]" and hung up.

Thereafter, the social worker arranged for two meetings with mother, but neither took place. Mother failed to attend one "due to care problems," and for the other she arrived one hour early, before the social worker was at the office.

DCFS's May 7, 2007, report also stated that mother had completed her parenting classes and a 52-week domestic violence program and that, with the exception of "a nearly three month interruption," she had been "consistent" in attending her individual therapy sessions. The report also said that mother was visiting C.A. once a week for two hours. The social worker had observed two of these visits and found that mother "is very active in play with [the] child," and that C.A. is "comfortable with his mother, runs to her and seeks her out for snacks and hugs." The foster mother too told the social worker that mother "is attentive to child during visits, plays with him." At the same time, foster mother said that she did not believe mother "is a good person to her son" and that "from her experiences with [mother], she can be nice one moment and not so nice the next."

In view of all of those facts and others described in the May 7 report, DCFS ultimately recommended termination of family reunification services for both parents (as the social worker had told mother on March 21) and that a permanent plan of adoption be implemented for C.A.

The court continued the contested permanency review hearing from June 21, 2007, to July 12, then to August 1, and finally to August 7, 2007.[3] In an interim review report dated July 12, 2007, the social worker stated that she tried to call mother on May 15 and May 29 but was unable to reach her because her phone was disconnected. On May 30, 2007, mother called the social worker, who briefly reminded mother that she needed to keep the social worker updated, but mother hung up quickly without responding. The social worker received no further updates from mother on her program. The foster family told the social worker that "mother has finished school and has a new job working in the medical field," but the social worker had not received "any proof of employment from mother, or any form of information." The report also stated that DCFS had identified a potential adoptive family for C.A. The report observed that once mother became aware of DCFS's recommendation that reunification services be terminated, she became noncompliant. Mother was aware that in order to be compliant she had to call the social worker "on a weekly basis to update on [her] status in therapy and visitation," but "since April 2007" she had "stopped calling." DCFS continued to recommend termination of reunification services and implementation of a permanent plan of adoption.

The contested permanency review hearing was conducted on August 7, 8, and 20, 2007. At the conclusion of the hearing the court found that the parents were not in compliance with the case plan and that return of C.A. to their custody would create a substantial risk of detriment and would likely result in severe emotional or physical harm to the child. The court terminated reunification services and set a hearing under section 366.26 for December 17, 2007.

On August 24, 2007, C.A. was placed with prospective adoptive parents.

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**3** The reasons for the repeated continuances were mother's belated retention of counsel and father's belated request for court-appointed counsel, followed by father's relocation to Texas.

On December 5, 2007, mother filed a section 388 petition asking the court to reinstate reunification services, place C.A. with her, or allow her to have unmonitored weekend and overnight visits. On December 27, 2007, father also filed a section 388 petition, and DCFS filed its section 366.26 hearing report the same day. According to the report, mother visited C.A. twice weekly for two hours per visit. The visits were monitored by a social worker, who reported that mother behaved appropriately with C.A. during the visits. DCFS recommended that parental rights be terminated and that C.A. be placed for adoption.

On December 17, 2007, the court continued the section 366.26 hearing to January 18, 2008, set both section 388 petitions to be heard January 18 as well, and ordered DCFS to prepare a report to address the section 388 petitions.

On January 18, 2008, DCFS submitted its report in response to the section 388 petitions. The report stated that in order to verify the counseling that mother claimed she had completed, the social worker spoke to the program facilitator in her domestic violence and anger management groups. The program facilitator said that mother had not told him that she had had a psychological evaluation completed and did not adequately disclose her own role as a perpetrator of domestic violence and the extent of her physical abuse of her older children. As a result, the domestic violence program that mother completed was for victims, not perpetrators. Likewise, when the program facilitator found, to his surprise, that mother was enrolling in the anger management program, she explained to him that "there was confusion over the type of program she was to participate in" and, though "she was not required to enroll" in anger management, she "thought it would be good to do for self growth." According to the program facilitator, the domestic violence program for perpetrators is materially different from the anger management program. Had the program facilitator known more about mother's history, he could have directed her to more appropriate programs. The report also stated that although mother's individual therapist initially said that mother would benefit from participating in a domestic violence for perpetrators program, the therapist later changed her opinion and said that the anger management

program was sufficient. Both the social worker and the program facilitator disagreed with the latter opinion, and the social worker concluded that mother continues to regard herself as a victim and "has not demonstrated an ability to take responsibility as a perpetrator of [d]omestic [v]iolence."

The social worker also noted that in an interview N.S. said that mother "will convince anyone to do what she wants, to make herself the victim, when in fact she victimizes others," and that she "takes no responsibility for the pain she caused and instead wants people to feel sorry for her." The social worker found N.S.'s statement to be corroborated by mother's conduct throughout the dependency proceedings, in which "mother has addressed her services as a victim and rarely demonstrated remorse or an ability to take responsibility for her past violent behaviors."

The report further noted that mother continued to refuse to "keep in consistent contact with" the social worker. The report also stated that when the social worker monitored mother's visits with C.A., she found that although C.A. "is able to socialize well with both his parents," he "initiates play with just about anyone and is able to pull away from both his parents in a[] healthy manner." According to the social worker, C.A. "shows an ability to bond with both parents, his current caregivers[, and] his social workers and does not necessarily show a larger [bond] with mother." The report ultimately recommended that reunification services not be reinstated.

On January 18 and 28, February 7, and March 6, 2008, the court heard evidence both on the section 388 petitions and for purposes of the section 366.26 hearing. On March 6, the court denied the section 388 petitions, concluding that the best interest of C.A. would not be promoted by the changes requested by the parents. The court observed that, based on recent improvements in mother's courtroom behavior, it appeared that within the last eight months she "somehow or another, got sane" and "made a major and consistent internal change in her life." But the court also noted that mother had shown "some ability to stabilize in the past," which "hasn't lasted long," so the court concluded that "given the huge, terrible history of this case," eight months was not "enough." The court continued the section 366.26 hearing to March 10.

At the hearing on March 10, mother testified that after C.A. was detained, when he was placed with his maternal great aunt and also when he was removed from her care and placed in a foster home, mother had unmonitored visits with him several times. Mother claimed she had informed the social worker and her supervisor about the unmonitored visits, but they did not believe her. The court continued the hearing to March 26 and instructed DCFS to investigate mother's claims concerning unmonitored visits.

In DCFS's report prepared for the March 26, 2008, hearing, the social worker stated that she had spoken with both the maternal great aunt, the first foster mother, the San Diego social worker who was handling the matter when the unmonitored visits allegedly took place, and that social worker's supervisor. The social worker and her supervisor denied ever having been told about any unmonitored visitation. The first foster mother likewise denied that there were any unmonitored visits when C.A. was placed with her. The maternal great aunt, however, described one unmonitored visit. In August 2006, when mother learned that the aunt and her adult daughters were taking C.A. to the beach for the day, mother insisted on joining them so as to visit with C.A. Once at the beach, mother expressed concern about C.A.'s being so long in the sun, and she insisted that he stay with her for a few hours at a nearby apartment. The aunt was reluctant, but mother was "very insistent and controlling" and took C.A. "for a little more than two hours." The aunt was "very remorseful" for having allowed mother "to manipulate her in this way" and "was scared that mother would not return" C.A. This incident led the aunt to realize that "she was not able to control mother's manipulating behaviors and that this posed a risk to [C.A.'s] well being." The aunt did not report the incident at the time because she "was afraid that she would be held accountable," but the incident led her to request that C.A. be removed from her care. The aunt fears that discussing the incident with DCFS even now "puts her family at further risk," and she believes that mother is "dangerous and unstable mentally" and that C.A. "is better off away from her care."

At the continued hearing on March 26, 2008, mother testified that she had at least six unmonitored visits with C.A. when he was placed with his maternal great aunt and at least four unmonitored weekend-length visits with C.A. when he was thereafter in his first foster placement. She also introduced four photographs that she testified were taken during the unmonitored visits.

After hearing further evidence and closing arguments, the court found by clear and convincing evidence that C.A. is likely to be adopted and found that no exceptions to termination of parental rights applied. In particular, the court found that C.A.'s relationship with his mother did not outweigh the benefit he would derive from a permanent adoptive home. The court believed that mother "had [C.A.] unmonitored several and many times" but concluded that those visits did not "alter where we are today."

The court entered an order terminating mother's and father's parental rights concerning C.A. Mother timely appealed.

## STANDARD OF REVIEW

We review for abuse of discretion the juvenile court's determination of whether to apply the parental relationship exception under section 366.26, subdivision (c)(1)(B)(i). (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)[4]

## DISCUSSION

Mother argues that the juvenile court abused its discretion in terminating her parental rights because it should have applied the parental relationship exception under section 366.26, subdivision (c)(1)(B)(i). We disagree.

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[4] We note, however, that some cases have applied the substantial evidence standard. (See *In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) For our purposes, "[t]he practical differences between the two standards of review are not significant." (*In re Jasmine D., supra,* 78 Cal.App.4th at p. 1351.)

Under section 366.26, subdivision (c)(1), if the juvenile court finds by clear and convincing evidence that a child is adoptable, it will terminate parental rights unless it finds a compelling reason for determining that termination would be detrimental on the basis of certain listed exceptions. Under section 366.26, subdivision (c)(1)(B)(i), the court may forego adoption and refrain from terminating parental rights if a parent has maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. To trigger the application of the parental relationship exception, the parent must show the parent-child relationship is sufficiently strong that the child would suffer detriment from its termination. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418 [loss of mere "frequent and loving" contact with parent insufficient to show detriment].)[5] The benefit to the child from continuing such a relationship must also be such that the relationship "'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.'" (*Ibid.*, quoting *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) A child who is determined to be a dependent of the juvenile court "should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent." (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) Adoption, when possible, is the permanent plan preferred by the Legislature if it is likely the child will be adopted. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 573.)

The juvenile court did not abuse its discretion in determining that the relationship between mother and C.A., although beneficial to some degree, did not meet C.A.'s need for a parent and thus did not outweigh the benefit C.A. would derive from a permanent adoptive home. Mother argues, to the contrary, that the following facts show the

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[5] Before January 1, 2008, the parental relationship exception was codified at subdivision (c)(1)(A) of section 366.26 rather than subdivision (c)(1)(B)(i), so cases decided before 2008 cite to the previous codification.

parental relationship exception does apply: (1) Mother was C.A.'s "exclusive care giver" for the first nine months of his life; (2) mother's visits with C.A. have gone "very well"; (3) mother had "many unmonitored weekend visits" with C.A., during which "no problems occurred"; (4) mother made "significant progress in resolving the problems" that led to C.A.'s detention; (5) mother "completed her court-ordered programs and obtained a job and an apartment"; (6) because of mother's "significant progress," the court "consistently granted her expanded visitation" with C.A.; (7) mother "expressed concern about [C.A.'s] health and brought him items which his foster mother indicated he needed"; (8) the visitation monitor said it was apparent that mother loved C.A.; (9) the prospective adoptive parent said that mother's contact with C.A. might be reduced postadoption; and (10) mother "was the only person [C.A.] recognized as his mother and whom he called 'mama.'"

The facts mother cites do not show that the juvenile court abused its discretion. They show only that mother was able to make some progress in addressing the problems that led to C.A.'s detention and that she was consequently able to develop a relationship with C.A. that was of some benefit to him. But mere "frequent and loving" contact (*In re Beatrice M., supra*, 29 Cal.App.4th at p. 1418) and a relationship that benefits the child to some degree (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1350) are not sufficient to meet the standard for application of the exception under section 366.26, subdivision (c)(1)(B)(i). In order to show that the exception applies, the parent has the burden of proving that the child's benefit from continuing the parental relationship would be sufficient to outweigh the benefit the child would derive from a permanent adoptive home. (See *In re Aaliyah R., supra*, 136 Cal.App.4th at p. 449.) In effect, mother must show that she occupies "'a parental role' in the child's life." (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108, quoting *In re Beatrice M., supra*, 29 Cal.App.4th at p. 1419.) Mother has not made such a showing.

"Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for

adoptive placement." (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) This is not an "extraordinary case" justifying application of the parental relationship exception. The trial court did not abuse its discretion in terminating mother's parental rights.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

BAUER, J.*

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* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.